6-15-2012

Island Woods Homeowner's Ass'n v. Mc Gimpsey Appellant's Brief Dckt. 39698

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IN THE SUPREME COURT
OF THE STATE OF IDAHO

* *

Island Woods Home Owners Association

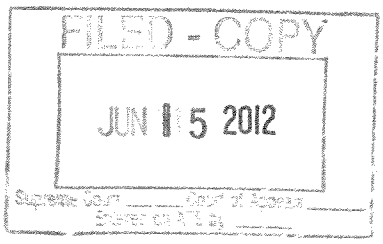
Plaintiff-Respondent,

vs. NO. 39698-2012

Philip P. McGimpsey

Defendant-Appellant.

JOLENE McGIMPSEY,
Sterling Development and Mortgage Co.
a Montana Corporation,
Defendants



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APPELLANT'S BRIEF

* *

Appeal of the Final Judgment entered on September 29, 2011, the District Court's October 4, 2011 Order re Summary Judgment ..., the January 12, 2012 Supplemental Judgment, and the May 24, 2012 Memorandum Decision and Order. The Honorable Cheri C. Copsey presided.

* *

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FILED: _____, 2012

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STATEMENT OF THIS CASE

In January 2001, Appellant and his wife (**Jolene**), purchased Lot 74 in the Island Woods subdivision from Dennis Baker, a longtime real estate developer in the Eagle, ID area. Island Woods is located between the north and south channels of the Boise river just east of Eagle Road. At the time of purchase, both Appellant and Jolene were full time residents of and domiciled in Billings, Montana. Consistent with the statutory form of title options available to Montana residents, title to Lot 74 was taken as undivided, unequal tenants-in-common (**TIC**), and not as joint tenants. *Record, Page 214, Corporate Warranty Deed.* Montana does not recognize a tenancy by entirety or community property.
In 2004-05, a single family residence was constructed on Lot 74 using funds from the separate estates of the parties and financing provided by Montana based mortgage lender, Sterling Development & Mortgage, Inc. (**Sterling**). To support construction financing, Appellant mortgaged only his interest to Sterling. *Record, Pages 28-30, 106-107, Real Estate Mortgage & Promissory Note.* Jolene's individual TIC interest was left unencumbered. The constructed residence became Appellant and Jolene's principal residence and homestead in late October 2005.

In the fall of 2006, Appellant and the Island Woods Homeowners

Association (**IWHOA**) disagreed over the meaning and enforcement of a landscaping provision in the HOA's Covenants, Conditions and Restrictions (**CC&Rs**). A lawsuit was filed on November 3, 2006 by Island Woods against Appellant. Neither Jolene, Sterling or Lot 74 were named in this litigation. Over its course, the 2006 litigation resulted in a series of judgments for attorney fees and costs against Appellant only.

On April 1, 2011, the instant action was filed as a two (2) count complaint against Appellant, Jolene and Sterling. Count One sought to void the construction indebtedness and mortgage between Appellant and Sterling based upon I.C. Section 55-901 and an alleged fraudulent transfer. *Record, Pages 21-22, Complaint.* Count Two sought a declaratory judgment against Jolene and Sterling as to Appellant's **three** judgments from the 2006 litigation. *Record, Pages 22-23, Complaint.*

Appellant answered the complaint on May 6, 2011. *Record, Pages 117-136, Answer.* Jolene and Sterling did not. Default judgments were entered against Jolene and Sterling on June 6, 2011. *Record, Page 3, ROA.* Plaintiff's motion for summary judgment was filed on June 13, 2011. Plaintiff's counsel filed an amended memorandum in support of its summary judgment motion on July 8, 2011, but failed to address by argument, citation or authority, Appellant's three

standing counterclaims set out in the Answer. *Record, Pages 166-188.* In an attempt to rectify this oversight, a truly unorthodox "Clarification" pleading was filed on July 14, 2011. Once again, no argument, citation or authority was presented to the District Court to support the positions taken. *Record, Pages 189-191, Plaintiff's Clarification...*

On September 29, 2011, after hearing, the District Court ***orally*** granted summary judgment against Appellant and entered a single paragraph Final Judgment in favor of IWHOA. No findings of fact, conclusions of law or memorandum decision supporting or discussing summary judgment were ever placed of record.

On October 13, 2011, Appellant filed a Rule 59(e), I.R.C.P., motion to vacate the September 29, 2011 Final Judgment on grounds of transparent judicial front running as evidenced by the Clerk's 4:- p.m. time stamp. *Record, Pages 238-239, 243-249.*

On December 1, 2011, Plaintiff's counsel admitted for the first time that as required by Rule 54, I.R.C.P., the attorney fee component of its then pending fee and cost request had *not* been "**actually paid**" by the putative Plaintiff/client. The admission also ran to four (4) fee and cost requests from

the previous 2006 litigation. *Record, Page 275, Plaintiff's Reply Memorandum.* Plaintiff's counsel filed an opposition to Appellant's Rule 59(e) Motion on December 9, 2011, but, as the District Court observed, failed to adequately address the merits of the motion. *Record, Page 287, Lines 6-11.* The District Court *sua sponte* proceeded to remedy Plaintiff counsel's advocacy shortcomings on December 22, 2011 by authoring a fourteen (14) page "Notice of Intent to Rule on Different Grounds on Rule 59(e) Motion." *Record, Pages 286-301.* Consistent with the District Court's declared "Intent," an Order was entered on January 9, 2012 denying the Rule 59(e) Motion and granting, without change or modification, Plaintiff its requested attorney fees and costs.

A Supplemental Judgment for attorney fees and costs **was entered against this Appellant only** in the amount of $21, 306.40 on January 12, 2012. An Amended Writ of Execution against the entirety of Lot 74 followed.

Appellant pursuant to Rule 62, I.R.C.P., moved the District Court on Monday, February 6, 2012 for an order to stay, while on appeal, all proceedings to enforce any of the Plaintiff's judgment(s) against Lot 74, Appellant's homestead. *Record, Pages 337-339, 341-348.*

The grounds for this Rule 62 Motion were two-fold:

1) Plaintiff failure to comply with the statutory provisions governing homesteads and their sale under an execution as set forth in I.C. Title 55, Chapters 10 and 11. More particularly, I. C. Sections 55-1101, et seq. which specifically apply to an execution sale of a homestead had not been followed.

2) The January 27, 2012 Amended Writ of Execution, page 3, listed two judgments that did not constitute final judgments in accordance with Rule 58, I.R.C.P., or this Court's case law precedent. Specifically, the June 3, 2010 judgment and the January 12, 2012 judgment were deficient in both form and substance.

Appellant filed a second companion Rule 62, I.R.C.P., motion with the District Court on Monday, February 13, 2012 asking for an order to quash the Plaintiff's January 27, 2012 Amended Writ of Execution (**Amended Writ**) and the January 31, 2012 Levy (**Levy**). *Record, Pages 349-351, 364-371.* The basis for this second Rule 62 Motion was that the Amended Writ and Levy were **mathematically and financially incorrect** and lacked the required substantive and procedural due process elements needed for a valid execution sale of a tenant-in-common owned homestead where one tenant was a judgment debtor and the other not.

A hearing was held on Thursday afternoon, March 15, 2012 at 2:30 pm on Appellant's two Rule 62 Motions. After receiving a brief argument from both parties, Judge Copsey, without explanation or discussion, denied both Rule 62 Motions. The Lot 74 homestead was subsequently sold at Sheriff's sale on Tuesday, March 27, 2012.

On March 30, 2012, Plaintiff filed a second attorney fee and cost memorandum for the period October 4, 2011 to March 27, 2012. The memorandum asked for fees evidenced by time entries of $17, 903.06, discretionary costs of $506.06 and **future** anticipated attorneys fees of $20, 750.00. Timely Rule 54(d)(6) and (e)(6), I.R.C.P., motions in objection and a requested hearing were filed on April 13, 2012. *Record, Pages 386-388.* The grounds for both motions were:

1. The attorney fees requested were in material part **unearned**, excessive and unethical, and

2. The attorney fee and cost request did not substantially comply with the pleading and practice requirements of Rule 54, I.R.C.P., Rule 35(a)(6), I.A.R., or this Court's precedent.

As allowed by Rule 7(b)(3)(C), I.R.C.P., a brief in support of the Rule 54(d)(6) and (e)(6) motions was filed on April 26, 2012. *Record, Pages 402-411.* Plaintiff did not file (and has not filed to date) a responsive or opposition brief to the fee and cost objections. This advocacy shortcoming was, however, short lived and most generously rewarded. On May 24, 2012, the District Court without hearing or further briefing entered a ten (10) page memorandum decision and order granting Plaintiff's counsel its catalogued fees and costs, as well as the estimated future fees requested.

APPEAL ISSUES

Appellant presents the following issues for this Court's review:

1) Under I.C. Section 55-908, on the Complaint's Count One (the fraudulent transfer claim), did the District Court err by granting summary judgment against the sole answering defendant based, wholly or in part, upon the default of the corporate co-defendant?

2) Under Rule 54, I.R.C.P., did the District Court err by awarding Plaintiff's counsel **unpaid or unearned** attorney fees and costs?

3) Did the District Court err under I.C. Section 11-102 by allowing the sheriff's sale to go forward based upon a demonstrated mathematically and financially defective writ of execution?

4) Under Rule 56, I.R.C.P., did the District Court err by *orally* dismissing the sole answering Defendant's three counterclaims without requiring any proof or evidence of the Plaintiff's affirmative defenses of issue and claims preclusion?

5) Under Rules 15, 54(c) and 56, I.R.C.P., did the District Court err by allowing the Plaintiff, *sans* motion or order, to add a claim for a fourth judgment *post-default* to the Complaint's Count Two--the declaratory judgment action?

6) Under Rule 56, I.R.C.P., based upon the evidence and exhibits, did the District Court err by constructively reclassifying the ownership interests of the two individual Defendants' homestead from tenant-in-common separate property interests to a community property interest?

7) Did the District Court err by allowing the sheriff's sale to go forward without requiring the Plaintiff to comply with the execution process governing homesteads as set forth in I.C. Section 55-1101, et. seq.?

8) Can a valid execution sale be conducted against a homestead owned by a husband (judgment debtor) and wife (non-judgment debtor) as undivided tenants-in-common without a pre-sale appraisal and a pre-sale determination of the tenants' respective interests?

DISCUSSION

Legal arguments lashed to the same mast by a common theme tend to be a more interesting read and are generally more persuasive. In this case, despite their wide ranging topics, nearly all of the issues on appeal share a surprising common denominator: I.A.R. 35(a)(6). Throughout this brief, Rule 35(a)(6)'s methodology and case precedent will be used to illustrate the striking contrast between the workings of this Court and the District Court below.

On March 22, 2012, in the case of *Stevenson v. Windermere Real Estate/Capital Group, Inc. et. al., 2012 Opinion No. 55, Docket No. 38121,* Justice Horton wrote:

> "A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." O'Guin v. Bingham Cnty., 139 Idaho 9, 15, 72 P.3rd 849, 855 (2003) (citing Beco Const. Co. v. City of Idaho Falls, 124 Idaho 859, 865, 865 P.2d 950, 956 (1993))."

One day later (March 23, 2012), in the case of *Vermont Trotter v. Bank of New York Mellon, et. al., 2012 Opinion No. 57, Docket No. 38022,* Justice Horton wrote:

"The Idaho Appellate Rules require an appellant to support its contentions "with citations to the authorities, statutes and parts of the transcript and the record relied upon." I.A.R. 35(a)(6). Thus, it is "well settled" that an issue on appeal will not be considered if it is "not supported by propositions of law, authority, or argument." *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 376, 973 P.2d 142, 147 (1999) (quoting *State v. Zichko,* 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). Even where an issue is "explicitly set forth in the

party's brief" as one of the bases for appeal, if it is "only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 382-83, 234 P.3d 699, 706-07 (2010) (citing *Inama v. Boise Cnty. ex rel. Bd. of Comm'rs,* 138 Idaho 324, 330, 63 P.3d 450, 456 (2003))."

Without question, the Stevenson and Trotter decisions are additional links in a long and unbroken line of precedent applying the methodology and lessons of Rule 35(a)(6), I.A.R. In short, except in the rarest of cases, this Court has made it abundantly clear that it is not in the business of rehabilitating or rescuing a party's failed advocacy. Why then, should a district court be allowed to conduct a case by any different standard in its decision making process? Constitutionally, the playing field should be level in any court. Turning now to the issues on appeal.

1) Under I.C. Section 55-908, on the Complaint's Count One (the fraudulent transfer claim), did the District Court err by granting summary judgment against the sole answering defendant based, wholly or in part, upon the default of the corporate co-defendant?

On April 1, 2011, the instant action was filed as a two (2) count complaint against Appellant, his wife, Jolene and Sterling Mortgage, a Montana corporation. Count One sought to void the construction indebtedness and mortgage between Appellant and Sterling based upon I.C. Section 55-901 and

an alleged fraudulent transfer. *Record, Pages 21-22, Complaint.* Appellant answered the complaint on May 6, 2011 denying all claims or allegations of an unlawful transfer. The Answer also requested a trial by jury on all factual and damage issues to be decided. *Record, Pages 117-136, Answer.* Jolene and Sterling did not answer the Complaint. Default judgments were entered against Jolene and Sterling on June 6, 2011. *Record, Page 3, ROA.*

The leading case and the gold standard on the subject of default judgments in actions involving multiple defendants is *Frow v. De La Vega, 82 U.S. 552 (1872).* The high Court held in *Frow* where a complaint alleges that defendants are jointly liable and one of them defaults, judgment should not be entered against the defaulting defendant until the matter has been adjudicated with regard to all of the defendants. Id. at 554. Consistent with the holding in *Frow*, if an action against an answering defendant is ultimately decided in his favor, then the action should be dismissed against both the answering and defaulting defendants. Federal courts have extended the rule in *Frow* to apply to defendants who are similarly situated, even if not jointly and severally liable. See, *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc., 740 F. 2nd 1499, 1512 (11th Cir. 1984).* With regard to this case, *Frow's* holding is clearly implemented by Rule 54(b), I.R.C.P.

Correspondingly, Rule 9(b), I.R.C.P., Fraud ..., requires that in all averments of fraud, the circumstances constituting fraud shall be stated with particularity. Simple notice pleading will not suffice. A heightened form of pleading is clearly required.

In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)*, the U.S. Supreme Court set forth the standard for evaluating a federal Rule 12(b)(6) motion and by extension a Rule 9(b), I.R.C.P., fraud claim. To avoid dismissal, a complaint must include "enough facts to state a claim to relief that is plausible on its face." Id. at 547. A "formulaic recitation of the elements of a cause of action" will not suffice. Id. at 555. See, also, Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). Rather, the complaint must set forth sufficient facts to "nudge the claim across the line from conceivable to plausible." Twombly, 550 U.S. at 570. Stated differently, the plaintiff must "assert facts that affirmatively and plausibly suggest that [he] has the right he claims ..., **rather than facts that are merely consistent with such a right**." See also, Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir.2007) (citing Twombly, 550 U.S. at 554–57).

Thus, the question becomes whether Count One in the Plaintiff's Complaint legally satisfied the *Twombly* "facially plausible" standard and by

extension Idaho's Rule 9(b)'s requirement of particularity. The District Court below never discussed or expressly ruled on this point of law.

Count One of the Complaint, beginning at Page 14, alleged a violation of Idaho's Uniform Fraudulent Transfers Act, I.C. Section 55-901 et. seq. *Record, Page 21.* Under Idaho's Title 55, the determination of "actual intent" and whether a fraudulent conveyance or transfer occurred is made on a case-by-case basis, as there is no precise formula for determining whether a transaction was a fraudulent conveyance. *I.C. Section 55-913.* **The question of fraudulent intent is one of fact, and not of law. *I.C. Section 55-908.*** The determination of actual fraudulent intent is not a neat, clean or comfortable process. Usually, it involves weighing a series of indicia of fraud, or more commonly, badges of fraud, for guidance. It cannot be said often enough especially in a Rule 56 summary judgment setting: **The question of fraudulent intent is one of fact, and not of law**. More on this topic later in this brief.

In a clear and mistaken departure from I.C. Section 55-913(2)'s listed factors, Plaintiff speculated on nine more custom indices of the allegedly fraudulent transfer between this Defendant and Sterling Mortgage. *See, Record, Page 21; Complaint, Paragraph 67.* The proof of these "badges," however

imaginary, also remains a factual inquiry using a reasonable man standard under I.C. Section 55-908.

Correspondingly, while a showing of one or more of a seemingly endless list of badges may be admissible as to the actual intent of this Defendant-Mortgagor, such a showing in and of itself does not create a presumption that a fraudulent obligation had been incurred. Badges of fraud do not establish fraud per se. Once again, I.C. Section 55-908 applies. Bottom line: Not all transfers or obligations incurred should be voided just because they don't fit into a neat, clean mold by running afoul of one or two badges.

I'm going to return for a moment to the pitfalls of the "indices" listed by the Plaintiff in Paragraph 67 of its Complaint. The federal Court's words found on Page 15 above are a constant reminder of Idaho's Rule 9(b) threshold:

> Stated differently, the plaintiff must "assert facts that affirmatively and plausibly suggest that [he] has the right he claims ..., **rather than facts that are merely consistent with such a right**."

The indices of alleged fraud listed in Paragraph 67 of the Complaint are not statutory indicators of fraud. They are more akin to the speculations of one who did not, or does not, truly understand the flexibility of a proprietary mortgage transaction, or its clearly designated governing foreign law. Logically speaking, if a Plaintiff is at liberty to generate a custom list of badges, there

wouldn't be a single commercial transaction that could withstand scrutiny for fraud.

Rule 9(b), I.R.C.P., requires particularity in pleading fraud. Rule 12(b)(6), I.R.C.P., requires sufficiency. The Complaint is nineteen pages in length. Nineteen (19) pages! You would surely expect that somewhere in those nineteen pages the Plaintiff would have taken the time to discuss the conflict of laws principles at issue in this case. The Promissory Note and the recorded Mortgage are by their terms clearly governed by Montana law. Where are the allegations or averments that either or both are unenforceable commercial paper transactions under applicable Montana law? The Complaint is utterly silent on this critical point. In a nutshell, the District Court delivered a perfect legal Catch 22: A non-resident mortgagee (Sterling) that can sue the Defendant on the underlying Promissory Note in one state (Montana) and a resident plaintiff that can sue the Defendant to void the underlying Mortgage in another state (Idaho)?

Measured against the heightened pleading standards of Rule 9(b) and Rule 12(b)(6), Plaintiff's complaint simply cannot pass muster for Rule 56 purposes. Where exactly is the "particularity" of pleading that is required to enable this Defendant to present a fact driven defense to a jury? It's certainly not found in Paragraph 67 of the Complaint. On its face, the Complaint in

Count One struggles to find any roots or support in I.C. Section 55-913. Other than by inference, that is. If one is free to infer, then the sky is the limit. Any Plaintiff can cement fraud simply by generating a custom list of badges that fit any fact pattern. Especially, in a proprietary mortgage situation. For this Defendant, the probabilities are all but impossible to beat. Sooner or later, one or two or three "custom" badges will be found to exist and presto -- instant fraud.

Logically speaking, if I.C. Section 55-908 clearly and unambiguously provides that:

> "**Fraud is a question of fact. In all cases arising under the provisions of chapters 5 to 9 inclusive, of this title, the question of fraudulent intent is one of fact, and not of law**; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." Emphasis supplied.

Then, it follows that the District Court could not have properly granted summary judgment against this sole answering defendant after a timely jury demand had been made without either a) assuming facts not in evidence, b) inserting Plaintiff's arguments that clearly weren't made or, c) imputing Sterling's default to this Defendant. In short, in its haste to grant summary judgment, the District Court clearly bypassed this Court's I.A.R. 35(a)(6) standards and this Defendant's I.C. Section 55-908's statutory protections.

Constitutionally, every person is entitled to an opportunity to be heard

in an impartial court of law upon every question involving rights or interests before he/she is affected by a judicial decision on the issues presented. When a party is not given a reasonable opportunity to be heard, a judgment is void. In the case of *Prather v. Loyd, 86 Idaho 45, 382 P.2nd 910 (1963),* the judgment was void because the trial court entered judgment against the makers of a promissory note without giving the makers an opportunity to present evidence regarding their affirmative defense of lack of consideration. The lessons in *Prather* certainly apply to the Answer filed in this case. Bottom line: The District Court's September 29, 2011 Final Judgment and all of the proceedings founded upon it are null and void and should now be vacated.

I turn now to a heavyweight and truly original appeal issue:

2) Under Rule 54, I.R.C.P., did the District Court err by awarding Plaintiff's counsel its unpaid or unearned attorney fees and costs?

On the surface, the above issue presents much like the Rule against Perpetuities. Easily stated, but because of its scope likely requires volumes for a truly logical and workable explanation. On April 26, 2012, in *Stonebrook Construction, L.L.C. v. Chase Home Finance, L.L.C., et. al., 2012 Opinion No. 68, Docket No. 37868,* Justice Horton wrote:

"This Court exercises "free review over interpreting a statute's meaning and applying the facts to the law." *VFP VC,* 141 Idaho at 331, 109 P.3d at 719. The standard this Court applies when interpreting statutes is well established:

> Interpretation of a statute begins with an examination of the statute's literal words. Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.

Curlee, 148 Idaho at 398, 224 P.3d at 465 (citing *Idaho Conservation League, Inc. v. Idaho State Dep't of Agric.*, 143 Idaho 366, 368, 146 P.3d 632, 634 (2006) (internal citations omitted)). A statute "is ambiguous where reasonable minds might differ or be uncertain as to its meaning." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999) (citing *Ada Cnty. v. Gibson,* 126 Idaho 854, 856, 893 P.2d 801, 803 (Ct. App. 1995)). "However, ambiguity is not established merely because the parties present differing interpretations to the court." *Id.*"

Rule 54(e)(5), I.R.C.P., provides that "attorney fees, when allowable by statute or contract, **shall be deemed as costs** in an action ...." See, *BECO Construction Company, Inc. v. J-U-B Engineers, Inc. ...,____ Idaho ____, 233 P.3d 1216 (2010).* See, specifically, Footnote 1 on Page 6 of the opinion.

Correspondingly, Rule 54(d)(1)(C) clearly states:

> " Costs as a Matter of Right. When costs are awarded to a party, such party shall be entitled to the following costs, **actually paid**, as a matter of right: ..." Emphasis supplied.

As an opening proposition, I would advance the argument that based upon Rule 54's use of the words "**actually paid**" that the attorney fees and cost provisions are in the nature of an indemnity agreement. Thus, unless the words "actually paid" can somehow be found to be ambiguous, a party that does not pay,

or is not under a binding obligation to pay, attorney fees or costs is not entitled to an award of such under Rule 54.

Webster's dictionary defines the word "actually" as: **in act or in fact**. Similarly, the word "paid" is defined as: **receiving pay or compensated**.

Combining the two definitions yields a common sense and practical result. "Actually paid" means receiving pay in fact. To think otherwise would be to veer into the well worn and long ago decided world of *pro se* party entitlements. This Court and the Court of Appeals have left little doubt that *pro se* litigants, including attorneys litigating *pro se*, are not entitled to an award of attorney fees. See, *Swanson & Setzke, Chtd. v. Henning, 116 Idaho 199, 774 P.2d 909 (Ct. App. 1989). See also, Barbee v. WMA Sec., Inc., 143 Idaho 391, 397, 146 P.3d 657, 663* (2006); Bowles v. Pro Indiviso, Inc., 132 Idaho 371, 377, 973 P.2d 142, 148 (1999).

Admissions against interest rarely result in a pleasant outcome for the declarant. On Page 8 of the December 1, 2011 Reply in Support of Plaintiff's Memorandum of Costs, Disbursements, and Attorney Fees, Plaintiff's counsel admits and argues:

"**The statute certainly provides that only costs that are actually paid can be awarded. That same language is not used when describing attorney fees.** Attorney fees are frequently awarded even though they have not yet been actually paid, *i.e.* in a contingency case. **In fact, in this case, four attorney fees judgments have already been awarded without any determination whether those fees were "actually paid." Counsel for Plaintiff has yet to be paid for any of the work that it has performed over the last few years**, work that it has been forced to perform because of Defendant's improper misuse of the judicial system. Counsel for Plaintiff will finally receive its just compensation from Plaintiff for all attorney fees incurred once the attorney fee liens are finally satisfied, either by Defendant voluntarily or through foreclosure of his real property. **Defendant did not cite any cases to support his claim that attorney fees cannot be awarded if the attorney fees have not been "actually paid." Counsel for Plaintiff was unable to find any case in Idaho or elsewhere where an "actually paid" requirement was discussed with regard to attorney fees. The cases do not discuss this point because it is obvious that the statutes do not require that attorney fees are "actually paid" before they are awarded as a judgment. Defendant is obligated to pay for the reasonable attorney fees incurred** because of his frivolous litigation, **irrespective of whether those fees have yet been actually paid to counsel by Plaintiff."** See, Record, Page 275. Emphasis supplied.

In point of fact, despite this Appellant's early Rule 17(a), I.R.C.P., efforts to ferret out the real party in interest, Plaintiff's counsel has now clearly admitted that present and past attorney fees have not been "actually paid" by their putative client. Nor has Plaintiff's counsel supplied evidence or clear proof of any binding obligation to do so. *See, Record, Pages 137-145, Appellant's Rule 17 Motion.* Thus, under Rule 54, I.R.C.P., as the true party in interest, and more importantly, as an attorney *pro se* litigant, Plaintiff's counsel was not properly entitled to an award of their unpaid attorney fees in this case, or judging from their admissions against interest, the past case as well.

"The bottom line in any award of attorney fees is reasonableness." *Luttunich v. Luttunich, 145 Idaho 746, 749-50, 185 P.3rd 258, 261-62 (2008).* The challenge, of course, is to reasonably define reasonableness. For example, is it reasonable to award fees to a law firm who doesn't really do the work? Most everyone would generally agree that it is not.

Plaintiff's March 30, 2012 fee and cost request draws a striking and interesting contrast between the higher and lower courts as to pleading and practice and the Rule 35(a)(6), I.A.R., standards. Consider this Court's methodology with what transpired recently in this case. Beginning on Page 2, Line 6 of the December 22, 2011, Notice of Intent ..., the District Court wrote:

> "Island Woods opposed on December 19, 2011, **but inadequately addressed** the Motion - simply arguing, without more, that McGimpsey's motion was frivolous and without foundation. McGimpsey responded. While the Court agrees that McGimpsey's Motion is clearly frivolous, because the Court intends to deny McGimpsey's Motion **on grounds not specifically raised by Island Woods**, ..." Emphasis supplied. *See, Record, Page 287.*

True to the Court's declared intent and ostensibly out of "an abundance of caution," the District Court then went on to author fourteen (14) pages of historical background and analysis in aid of the Plaintiff's non-existent advocacy. Given the unmistakable tenor and direction of the District Court's December 22, 2011 Notice of Intent ..., at least from the Plaintiff's perspective, what manner of

fool wouldn't cheerlead for a court? I certainly would have. Friends with black robes in high places are good to have.

Similarly, on Page 2, beginning at Line 11 of the District Court's January 9, 2012 Order granting attorney fees and denying my Rule 59(e) Motion is found:

"While the Court agrees that McGimpsey's Motion and his allegations were clearly frivolous, because the Court intended to deny McGimpsey's Motion **on bases not discussed by Island Woods, out of an abundance of caution, the Court gave both parties notice of the bases for its decision that it was not biased** and allowed the parties to file simultaneous responses by January 3, 2012." Emphasis supplied. *See, Record, Page 319.*

So here's my question: Who deserved to be paid here? Was it the person who moved the ball down court, or was it the cheerleader? And, was it reasonable, or ethical for that matter, for the District Court to award fees and costs on key motions to lawyers that really didn't do the work?

At the appellate level the answers to the foregoing questions are reasonably clear. At the district court level, based upon the May 24, 2012 Memorandum and Order, the answers are most certainly gauzy. Here's a simple equation that sums up my point: **No law cited + no arguments made + no authority provided = NO WORK = NO PAY!** Let's give credit where credit is due. The District Court did the work. Plaintiff's counsel certainly didn't deserve the fee award. Moving on to the next issue.

3) **Did the District Court err under I.C. Section 11-102 by allowing the sheriff's sale to go forward based upon a demonstrated mathematically and financially defective writ of execution?**

I.C. Section 11-102 clearly states:

"Form of writ. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and **it must intelligently refer to the judgment**, stating the court, the county where the judgment roll is filed, **and if it be for money, the amount thereof, and the amount actually due thereon**, and if made payable in a specified kind of money, or currency, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows: ..." Emphasis supplied.

Once again, we return to the practical lessons of the Stonebrook Construction case discussed above and the plain meaning of the words "**actually due**" found in I.C. Section 11-102.

On February 13, 2012, I filed a motion under Rule 62, I.R.C.P. asking the District Court to quash the Amended Writ and Levy against Lot 74 based upon demonstrated mathematical and financial defects. *Record, Pages 349-351.* A brief in support of the Rule 62 Motion was filed on February 27, 2012, prior to hearing. *Record, Pages 364-371.* Attached to the brief as Exhibit A (*Record, Page 371*) was an Excel spreadsheet that clearly demonstrated to the District Court the mathematical and financial errors in the Amended Writ. A hearing was held on March 15, 2012. Following each parties' presentation, the District Court,

without explanation, orally ruled that the Rule 62 Motion was denied. The oral ruling was followed by a written Order, prepared by Plaintiff's counsel. *Record, Pages 358-360.* The written Order, like the bench ruling, did not address the Amended Writ's erroneous math and "actually due" problem.

Of all of the disciplines that intersect with the law, principles of mathematics should be the most predictable. After all, what could be more certain than *Principal x Interest Rate x Time*? In theory, given the proliferation of inexpensive calculators, I.C. Section 11-102's "actually due" requirement should have been a relatively easy task to accomplish. Apparently not!

> Rule 69, I.R.C.P., clearly provides that:
>
> "... **a writ of execution shall not issue** for an amount other than the face amount of the judgment, and costs and attorney fees approved by the court, **without an affidavit of** the party or **the party's attorney verifying the computation of the amount due** under the judgment. ..."

It is difficult, if not impossible, to understand why the District Court would allow the sheriff's sale of Lot 74 to go forward based upon a statutorily defective writ of execution and its equally defective levy. Correspondingly, given the obligations set forth in Rule 69, I.R.C.P., it is equally perplexing why Plaintiff's counsel wouldn't take the time to correct the math on a knowingly defective writ. Especially, a writ that asked for more money than the original

judgments stated. In mathematical terms, this issue can be summed up with a simple equation: **Bad Math = Defective Writ & Levy = Invalid Sheriff's Sale**.

4) **Under Rule 56, I.R.C.P., did the District Court err by *orally* dismissing the sole answering Defendant's three counterclaims without requiring any proof or evidence of the Plaintiff's affirmative defenses of issue and claims preclusion?**

Once again, Rule 35(a)(6), I.A.R., standards will be used to challenge and question the District Court's dismissal of this answering Defendant's three counterclaims via summary judgment. *Record, Pages 129-132, Answer. Record, Page 218, Final Judgment.*

Plaintiff filed its motion for summary judgment on June 13, 2011 followed by an Amended Memorandum in support on July 8, 2011. *Record, Pages 166-188.* Neither the motion nor the lengthy supporting memorandum made any mention of the Defendant's three (3) counterclaims. On July 14, 2011, Plaintiff's counsel filed a one-of-a-kind and truly odd pleading titled, "Plaintiff's Clarification ..." *Record, Pages 189-191.* On Page 2 of the Clarification, Plaintiff's counsel unabashedly declared:

"Plaintiff, in its memorandum in support of summary judgment, did **not** raise any arguments regarding the counterclaims because Plaintiff believes the counterclaims are patently invalid and merit no discussion. All of Defendant's counterclaims are related to issues that were already fully resolved in prior litigation and Defendant's collateral attack

is barred by the doctrines of claim and/or issue preclusion. To the extent Defendant has arguments to the contrary, Plaintiff has filed this clarification in order to allow Defendant sufficient opportunity to raise those arguments in his opposition brief to the motion for summary judgment." Emphasis supplied.

The applicable principles of proper pleading and practice were discussed in *Dawson v. Cheyovich Family Trust, et. al., 149 Idaho 375, 234 P.3rd 699 (2010).* To wit:

> "We will not consider an issue not "supported by argument and authority in the opening brief." Jorgensen v. Coppedge, 145 Idaho 524, 528, 181 P.3rd 450,454 (2008); see also Idaho App. R. 35(a)(6)."
>
> "Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this court." Inama v. Boise County ex rel. Bd. of Comm'rs, 138 Idaho 324, 330, 63 P.3rd 450, 456 (2003)."

Distilled to its essence, Plaintiff's motion for summary judgment, its amended supporting memorandum and the oddball tag along Clarification pleading are truly insufficient to satisfy the above noted holdings. Despite the obvious attempt by Plaintiff's counsel to plug a gaping hole in the opening volley, the July 14, 2011 Clarification pleading fails in a number of critical ways:

First, while the Clarification might have used the right buzzwords like claims preclusion or issue preclusion, there certainly was no argument or authority presented to support such. The kindest thing that can be said for the

Clarification's method and style of pleading is that it is nothing more than a drive by effort, or to paraphrase the Inama court, a "mention in passing."

Secondly, the Clarification pleading is not a complete or adequate defense to the three Counterclaims. In its June 17, 2011 Reply to the three Counterclaims, Plaintiff's counsel certainly raised the affirmative defenses of claims and issue preclusion. *Record, Pages 162-165.* But, as this Court has held:

> **"Res judicata is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence."**

See, *Oregon Mutual Insurance Company v. Farm Bureau Mutual Insurance Company of Idaho, 148 Idaho 47, 218 P.3rd 391 (2009).* See also, *Ticor Title Co. v. Sanion, 144 Idaho 119, 122, 157 P.3rd 613,616 (2007).*

How then was dismissal of any the three counterclaims even remotely possible under Rule 56, I.R.C.P., given that the Plaintiff offered absolutely **no** cogent argument or cited authority for dismissal in its Rule 56 Motion, the supporting Amended Memorandum, the Clarification pleading, the reply brief, or at hearing? The simple answer is that one cannot prevail on summary judgment by simply throwing out a few buzzwords and then calling on your opponent to make a self-defeating argument. Plaintiff's counsel erred badly and so did the District Court for allowing such glaring shortcomings.

5) **Under Rules 15, 54(c) and 56, I.R.C.P., did the District Court err by allowing the Plaintiff, *sans* motion or order, to add a claim for a Fourth Judgment *post-default* to the Complaint Count Two--the declaratory judgment action?**

Rule 54(c), I.R.C.P., Demand for judgment, states in applicable part that:

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

In Count Two, on Page 15 of Plaintiff's April 1, 2011 Complaint (*Record, Pages 22-23*), the District Court was asked to validate each of the three (3) judgments listed in Paragraphs 75-77 and enter a declaratory judgment accordingly. My May 6, 2011 Answer with its general and affirmative defenses and counterclaims timely responded to Count Two. On July 8, 2011, Plaintiff's counsel attempted to quietly slip a "fourth judgment" into this lawsuit without a proper Rule 15, I.R.C.P., amendment via the Amended Memorandum in support of summary judgment. *Record, Page 172*. Consider the following admission by Plaintiff's counsel found on Page 172, Record, last two sentences:

> **"The facts regarding McGimpsey's unsuccessful appeal and the Fourth Judgment were inadvertently left out of the Complaint. The Fourth Judgment was recently recorded in the Ada County Recorder's Office on June 7, 2011, as Instrument No. 111046347." (Counsel Aff., Paragraphs 8, 19, & 20 at Exhs. F, Q & R.)"**

The major problem with this late-to-the-party effort is that there were two defaulted defendants that were served with a complaint that was missing any mention of the "Fourth Judgment." In plain fact, the "Fourth Judgment" wasn't

filed of record until June 7, 2011. I'm not going to waste a lot of time discussing why a late filed claim may be slightly unfair or prejudicial to any or all of the defendants, except to note that the Fourth Judgment increased the Plaintiff's April 1, 2011 prayer request by approximately fifty percent (50%).

During the run up to summary judgment, Plaintiff had a classic Sophie's choice: Either drop any consideration of the Fourth Judgment from the case, or file a proper Rule 15, I.R.C.P., motion to amend the original complaint. Plaintiff did neither under the watchful eye and with the blessing of the District Court. Under Rule 54(c), I.R.C.P., if a default judgment cannot be different in kind from or exceed in amount that prayed for in the demand for judgment, then it follows that facts "inadvertently" left out of an original complaint which increase the amount prayed for, fundamentally give rise to due process with notice and opportunity to be heard by all of the defendants, defaulted or otherwise. Summary judgment under Rule 56, I.R.C.P., should not have been granted to a Plaintiff that violated Rule 54(c) and bypassed Rule 15's amendment process. This was clear err by the District Court.

6) **Under Rule 56, I.R.C.P., based upon the evidence and exhibits, did the District Court err by constructively reclassifying the ownership interests of the two individual defendants' homestead from tenant-in-common separate property interests to a quasi community property interest?**

Beginning on Page 16 of the Rule 56 amended supporting memorandum (*Record, Page 181*), Plaintiff advanced the unsupported and speculative arguments that somehow the McGimpseys' separate property interests created in 2001 became community property, and through sheer judicial magic, this Defendant's individual judgments became a community debt. The facts surrounding the Property's purchase mandate otherwise.

Lawyers in general are notorious at distilling facts to suit the slant of their arguments. On Page 2 in the Introduction section of Plaintiff's memorandum in support of summary judgment, we find this rather clever distillation:

> "The McGimpseys were married in 1993 and previously lived in Montana. In 2001, they purchased real property at 335 E. River Quarry... In September 2004, they began construction of a residence on the Property" ***Record, Page 167.***

To be fair and correct from a separate property vs. community property perspective, the factual statements should have read:

> The McGimpseys were married in ***Montana*** in 1993. In January 2001, as indicated in the corporate warranty deed of record, the McGimpseys, as ***Montana*** residents, took title as undivided tenants in common to the property located at 335 E. River Quarry Dr.
>
> In September 2004, while ***Montana*** residents, the McGimpseys began construction of a residence on the Property.

From a legal perspective, the contrasting factual statements are, as

Mark Twain once quipped, much like the difference between lightening and a lightening bug. One small word change with one huge difference in outcome.

From a far more important legal perspective, Plaintiff's magic conversion attempt totally ignored this Court's holding in *Twin Falls Bank & Trust v. Holley, 111 Idaho 349, 723 P.2d 893 (1986).* The major holding in this case effectively and significantly restricted creditors' rights under a property settlement agreement by charting a new path for Idaho residents. In summary, this Court's decision precludes creditors of the community from pursuing the community property distributed to a non-debtor spouse unless the creditor can allege and prove that the spouse ordered to pay the community debt was not awarded sufficient assets to satisfy the debt. *See, Holley, 111 Idaho at 354, 723 P2d at 898.*

While the facts in this situation are certainly different than those in Holley, the legal conclusions are spot on. If a downstream conversion of community property to separate property can be respected and upheld as in *Holley*, certainly real estate that has always been held in separate property interests can be afforded the same legal protections. Montana is a common law property state and does not recognize either community property, or tenancy by entirety. Married residents are allowed to hold and maintain separate or joint property

interests as determined by the form of ownership. A warranty deed taken as undivided tenants in common (*Record, Page 214.*) creates separate property interests subject to generally accepted principles of contribution upon sale or disposition. See, M.C.A. (Montana Code Annotated) Sections 70-29-101, 70-29-321. In this respect, Idaho's law is no different. See, I.C. Sections 6-501, 6-520.

The tenancy of Lot 74 has not changed since its purchase. It started out in 2001 as undivided tenants-in-common and remained throughout the course of this lawsuit as undivided tenants-in-common. See, *Record, Page 214.* Measured against Rule 35(a)(6), I.A.R., standards, there was simply nothing factually of record, or for that matter introduced into the record, to indicate or remotely suggest that Lot 74 was community property. From a Rule 56, I.R.C.P., perspective, this issue should have been a non-starter. Plaintiff's speculative "presumption" that all property acquired after marriage is community property is, in this instance, unsupported by the facts surrounding the Montana residency at the time of purchase and the corporate warranty deed of record. The intent of the McGimpseys of Billings, Montana was clear. The Property, Lot 74, was to be held in separate property interests as undivided tenants-in- common, not community property.

For a correct summary judgment to be have been entered, Rule 56,

I.R.C.P., requires a genuine absence of material fact and propositions of law in support. The District Court erred by ignoring the clear and unambiguous evidence of Lot 74's ownership, and further erred by allowing the sheriff's sale of Lot 74 to go forward and be accounted for as a sale of community property, rather than undivided tenant-in-common owned property.

7) **Did the District Court err by allowing the sheriff's sale of Lot 74 to go forward without requiring the Plaintiff to comply with the execution process governing homesteads set forth in I.C. Section 55-1101, et. seq.?**

On September 29, 2011 @ 4- P.M., a putative "Final Judgment" was entered by the Ada Clerk of Court pursuant to Rule 58(a), I.R.C.P. *Record, Pages 218-219.* On October 4, 2011, the District Court signed a follow-up order drafted by Plaintiff's counsel directed to the orally granted summary judgment ruling. *Record, Pages 220-225.* This Order also provided a basic blueprint for the execution sale of the two individual Defendants' Lot 74 homestead. On Page 3, Paragraph 6, (*Record, Page 222*) the following appears:

> "That the Property **be** foreclosed and **sold** in one parcel by the Sheriff of Ada County, State of Idaho, at public auction **in the letter and manner prescribed by law**, ... " Emphasis supplied.

In an attempt to follow the dictates of the District Court's October 4, 2011 Order, Plaintiff's counsel filed an Amended Writ of Execution dated January 27, 2012, a Notice of Levy dated January 31, 2012 and a Notice of Sale dated

February 1, 2012. Procedurally, Plaintiff's counsel was doing pretty well up to the January 31, 2012 Notice of Levy. Then, the relevant law went missing.

Wrongly and without justification or explanation, Plaintiff's counsel threw statute to the wind by utterly failing to comply with the provisions governing homesteads and their sale under an execution as set forth in Idaho Code Title 55, Chapters 10 and 11. Specifically, there was zero effort and zero compliance with Idaho Code Sections 55-1101, et seq. *Record, Pages 337-348.*

I.C. Section 55-1101 specifically governs homesteads and is the statutory starting point for any execution sale. If the judgment sought to be enforced is not a case within the judgment classes set forth in I.C. Section 55-1005, the judgment creditor applies to the probate judge of the county where the homestead is located for an order to proceed with an execution sale. From the face of the Plaintiff's Amended Writ of Execution, it is abundantly clear that Plaintiff's putative judgments, regardless of their legal sufficiency, are not within the classes of judgments set forth in I.C. Section 55-1005. Hence, Plaintiff, as a judgment creditor, was fundamentally required to follow the statutory mechanism beginning with I.C. Section 55-1102 and ending with Section 55-1115 to legally and properly execute against the Defendants' Lot 74 homestead property.

In what became a repetitive pattern of error riddled pleading and practice, Plaintiff's counsel made absolutely no effort to follow the letter or the manner of the law, arguing instead to the District Court that following this law was merely an option as long as the value of the homestead could confidently exceed the homestead exemption. The fundamental flaw in the execution process is obvious.

Somewhere between Paragraph 6 and Paragraph 9 of the District Court's October 4, 2011 Order, Plaintiff's counsel failed to follow, incorporate, or even reference, the homestead execution sale mechanism called for in Idaho Code Title 55, Chapters 10 and 11. Surely the words "*letter and manner prescribed by law*" chosen by Plaintiff's counsel and subscribed to by the District Court were intended to be more than filler or hollow promises. After all, we are talking about a homestead property here. And, as will be discussed at more length in the issue that follows, the whole execution sale process is about more than just value. There is also the parties' intangible right to a fair sale in a public forum populated by willing independent buyers. Plaintiff's charade of fairness cloaked by the words "*letter and manner prescribed by law*" ignored the law, perverted the process and tainted the outcome. The homestead, Lot 74, should have been subjected to the rights and protections found in Idaho Code Title 55, Chapters 10 and 11. To think otherwise, is just plain wrong.

It has often been said that: "There is no perfection in art or law." However, Plaintiff's failure or unwillingness to follow the "*letter and manner prescribed by law*" called for in the District Court's October 4, 2011 Order should not have been a springboard for a defective execution sale against this Defendant's homestead. Moving on to the last issue.

8) **Can a valid execution sale be made against a homestead owned by a husband (judgment debtor) and wife (non-judgment debtor) as undivided tenants-in-common without a pre-sale appraisal and a determination of the tenants' respective ownership interests?**

On February 22, 2012, Governor Otter signed Senate Bill 1222 into law. Senate Bill 1222 made changes to I.C. Sections 55-1101 and 1103, effective July 1, 2012. The changes, in essence, moved the petition and appraisement process for a homestead's execution sale from the probate court to the district court. The petition and appraisement process itself remains unchanged.

As discussed above under Issue #6, the tenancy of the Lot 74 homestead property has not changed since its purchase. It started out in 2001 as undivided tenants-in-common and remains to this day as undivided tenants-in-common. See, *Record, Page 214.* Predictably, the law governing an execution sale of a homestead is a bit more complicated in the case of a homestead owned by two undivided tenants-in-common where only one tenant is a judgment debtor.

The issue of an execution sale of an undivided tenant-in-common owned homestead is one of first impression in Idaho. As a starting point, please consider the guidance found in *Ingebretsen v. McNamer, 137 Cal.App.3d 957, 187 Cal.Rptr.529, Civ. No. 51806. Court of Appeals of California, First Appellate District, Division Three (1982):*

"Case law adhering to the California Constitution has long held that the homestead statutes are to be construed liberally on behalf of the homesteader. Swearingen v. Byrne (1977) 67 Cal.App.3d 580, 584 [136 Cal.Rptr. 736]; Schoenfeld v. Norberg, supra, 11 Cal.App.3d 755, 764. This is well illustrated in the Swearingen case. There it was held that the recording of an abstract of judgment, which normally establishes a lien upon the real property of the judgment debtor (Code Civ. Proc., 674) does not establish a lien on homesteaded property. **Only after there has been a levy of execution on the excess value of the property over the homestead exemption does a lien attach.**

While Swearingen does not address the question of retroactivity of exemption amount, **it does show that the right to execute on a judgment does not automatically allow the judgment creditor to satisfy his judgment with the excess value of property over the homestead exemption. To give maximum protection to the homesteader, the creditor must first take the procedural steps prescribed in the Civil Code, and the court must then determine that there is excess over the homestead exemption which can be sold to satisfy the judgment**. Civ. Code, 1250; In re Rauer's Collection Co. (1948) 87 Cal.App.2d 248, 254 [196 P.2d 803]." Emphasis supplied.

While certainly important, I.C. Section 55-1101, et. seq., is not, however, the whole or only process to be considered when a homestead property is sold under a writ of execution. The laws governing judgments and the ownership of real property have to be integrated into the process and considered as well. See, *I.C. Section 6-501, Section 6-520 and Section 32-906(2).*

Under the Plaintiff's Amended Writ, the Ada Sheriff sold the Lot 74 homestead which was owned by two people as undivided tenants-in-common, only one of which was a judgment debtor, without any appraisal guidance whatsoever. How exactly, without an appraisement process to determine the judgment debtor's interest versus the non-judgment debtor's interest, was a proper execution sale possible? And, pray tell, how was Lot 74's fair value determined without an appraisal? Perhaps this is why there was a $328,000 difference between the Ada Assessor's value ($609,000) and the high bid ($281,000) at the sheriff's sale? After all, it isn't just the amount of the homestead exemption that sets the correct minimum bid at auction. Both the judgment debtor's and non-judgment debtor's respective tenant-in-common interests should have been algebraically factored into the equation to determine a minimum sales price. To think otherwise, would lay waste to the law governing judgments by allowing the judgment creditor to execute against an innocent party's ownership interest without just or adequate compensation. In this case, this is especially true for the last two *post-default* judgments listed in the Amended Writ that the non-judgment debtor/owner was never given notice of, or a reasonable opportunity to defend against.

Lastly, under I.C. Section 55-1101, et. seq., without an appraisement process, how could the Plaintiff in good faith represent via affidavit, or otherwise,

that the sole judgment debtor, as an undivided tenant-in-common, had any interest in excess of the homestead exemption to sell? If the homestead statutes are to be construed liberally on behalf of the homesteaders, a mere guess at ownership percentages or valuation by opposing counsel simply won't do.

In this undivided tenant-in-common homestead situation where one tenant is a judgment debtor and the other not, the reversible error is obvious: Without an appraisal under I.C. Section 55-1101, et. seq., Plaintiff's Amended Writ and Levy legally failed to set the proper amount of the **minimum bid** required at the sheriff's sale. The March 27, 2012 sheriff's sale of Lot 74 is plainly and unquestionably defective and should be set aside.

Conclusion

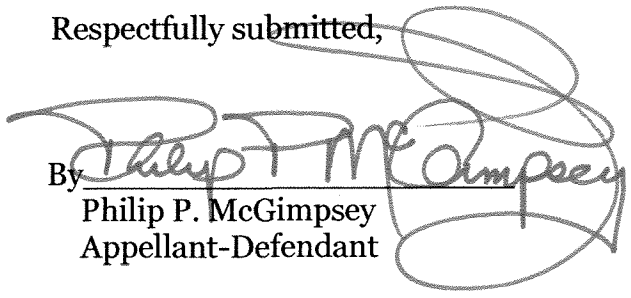
If there was one lesson to be learned from this lawsuit as far case management is concerned, it would most certainly be derived from the District Court's unwavering demeanor. Like a heat seeking missile intent on destroying its target, the District Court was not about to let opposing facts, or controlling law, or this Court's clear precedent upset a predestined and painful outcome. Every motion that I filed, every argument that I made was summarily deemed frivolous. However, when my opponent faltered in his advocacy, rather than finding a classic case of frivolity, the District Court was quick to not only supply the shortcomings, but went on to rule favorably on its own work product. Perhaps the law is like love, promising more than it will ever deliver. However, under the simple minded notions of fair play and substantial justice, a District Court should be required to play by the same rules as everyone else. The I.A.R. 35(a)(6) standards discussed throughout this brief are grounded as much in common sense, as they are in the law itself. If any party is allowed to win a case without offering solid undisputed facts, cogent arguments or supporting propositions of law and cited authority, then something is dreadfully amiss. Viewed in this light, a lawsuit could be reduced to simply picking an activist jurist, and in essence attaching blank paper to the body of any pleading.

When a case is measured , not by the quality of the evidence, or the logic of the arguments, or the controlling law and precedent, but rather by the level of incessant invective, the system is broken. A summary judgment proceeding then becomes an ordeal which is neither dignified nor appropriate and, predictably, the result reflects the performance and the process is demeaned, as are the participants.

Somehow, somewhere along the path to summary judgment, the process wrongly divorced itself from I.C. Section 55-908's constitutional protections and morphed into a quasi trial on the merits without the requisite material fact finding, or weighing of the true facts. At some point in this process, cooler heads must lead the way. This case is, without question, ready for the three R's: **Reverse, Remand** and, regrettably, **Reassign.**

DATED this 15th day of June, 2012.

Respectfully submitted,



By _____
Philip P. McGimpsey
Appellant-Defendant

CERTIFICATE OF SERVICE

This is to certify that pursuant to I.A.R. Rule 34(d), two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** were served by United States mail, postage prepaid on this 15th day of June 2012, upon the following:

Fredric V. Shoemaker, Esq.
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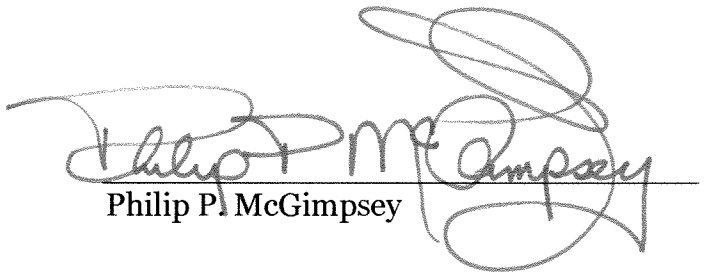

Philip P. McGimpsey